



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–MB–2018–0090; FF09M22000–212–FXMB1231099BPP0]

RIN 1018–BD76

Economic Analysis for Proposed Regulations Governing the Take of Migratory Birds

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; document availability.

SUMMARY: We announce the opportunity to review and comment on two economic analysis documents prepared during development of the proposed rule to revoke the January 7, 2021, rule governing the prohibitions on incidental take under the Migratory Bird Treaty Act. This document announces the availability of an initial regulatory flexibility analysis and a regulatory impact analysis for public review.

DATES: Submit comments by [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically*: Go to the Federal eRulemaking Portal:

<https://www.regulations.gov/docket/FWS-HQ-MB-2018-0090/document>. You may submit a comment by clicking on “Comment.” Please ensure you have located the correct document before submitting your comments.

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing,
Attn: FWS–HQ–MB–2018–0090, U.S. Fish and Wildlife Service, MS: JAO/3W, 5275
Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Public Comments**, below, for more information).

FOR FURTHER INFORMATION CONTACT: Jerome Ford, Assistant Director,
Migratory Birds, at 202–208–1050.

SUPPLEMENTARY INFORMATION:

Background

On January 7, 2021, the Service published a final rule defining the scope of the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 et seq.) as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA (86 FR 1134) (hereafter referred to as the “January 7 rule”). The January 7 rule codified an interpretation of the MBTA set forth in a 2017 legal opinion of the Solicitor of the Department of the Interior, Solicitor’s Opinion M–37050, which concluded that the MBTA does not prohibit incidental take.

Following Council on Environmental Quality regulations that implement the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the Service prepared a final

environmental impact statement (EIS) for the January 7 rule: “Final Environmental Impact Statement; Regulations Governing Take of Migratory Birds,” available on <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090 (<https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-14242>). The alternatives analyzed in that EIS cover the effects of interpreting the MBTA both to include and exclude incidental take. We issued a record of decision based on the final EIS. The Service also prepared a regulatory impact analysis (RIA) to support the January 7 rule, available on <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090 (<https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-14241>). That RIA analyzed the economic impacts of three alternatives: a *No Action Alternative*—Retain the existing legal interpretation under M–37050 that the MBTA excludes incidental take; *Alternative A*—Promulgate regulations that define the scope of the MBTA to exclude incidental take; and *Alternative B*—Promulgate regulations that define the scope of the MBTA to include incidental take.

On May 7, 2021, the Service published in the *Federal Register* (86 FR 24573) a proposed rule seeking public comment on whether the Service should revoke the January 7 rule, which defined the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA. This proposed rule is available on <http://www.regulations.gov> in Docket No. FWS–HQ–MB–2018–0090 (<https://www.regulations.gov/document/FWS-HQ-MB-2018-0090-18943>). For the May 7, 2021, proposed rule, we modified the analysis in the RIA for the January 7 rule, given that the January 7 rule went into effect on March 8, 2021. The regulatory impact analysis presented for the proposed rule revises the alternatives to reflect the current baseline with the January 7 rule in effect. While the proposed rule does not itself propose codification of a new regulation that interprets the MBTA to prohibit incidental take, the effects of the removal of the January 7 rule are substantially similar to those described in Alternative B

of the RIA for the January 7 rule. Revoking the January 7 rule would have the effect of reverting the government's interpretation of the MBTA to prohibit incidental take consistent with longstanding agency practice prior to publication of M-37050, subject to the exercise of enforcement discretion and the applicable judicial precedent in a given jurisdiction. Consistent with Alternative B, the Service will consider further steps to implement the MBTA consistent with an interpretation that it prohibits incidental take if it finalizes the proposed revocation rule.

The Regulatory Flexibility Act of 1980 (RFA; 5 U.S.C. 601 et seq.) requires agencies to evaluate the potential effects of their proposed and final rules on small businesses, small organizations, and small governmental jurisdictions. Section 603 of the RFA requires agencies to prepare and make available for public comment an initial regulatory flexibility analysis (IRFA) describing the impact of proposed rules on small entities unless the agency can certify under section 605(b) that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Section 603(b) of the Act specifies that each IRFA must contain:

- A description of the reasons why action by the agency is being considered;
- A succinct statement of the objectives of, and legal basis for, the proposed rule;
- A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply;
- A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and
- An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

While the Service believes that certification under section 605(b) of the RFA is

likely appropriate in regard to the May 7, 2021, proposed rule and consistent with our analysis of economic impacts under the January 7 rule, we have developed an IRFA out of an abundance of caution to ensure that economic impacts on small entities are fully accounted for in this rulemaking process.

The Service is making available to the public for review and comment both the revised RIA and the IRFA for the May 7, 2021, proposed rule (86 FR 24573) to revoke the January 7, 2021, rule (86 FR 1134). As noted above, the proposed rule is also available in the same docket for reference when reviewing the RIA and IRFA. Comments on the RIA and IRFA and any additional comments on the proposed rule will be addressed in the final rule.

Public Comments

You may submit your comments and materials by one of the methods listed in **ADDRESSES**. We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive will be available for public inspection on <http://www.regulations.gov>.

Authority: This document is published under the authority of the MBTA and section 603 of the RFA.

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

